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Summary record of the 2344th meeting

Topic:
Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

57. So far as the possible exclusion of crimes from the scope of the provisions on the circumstances precluding wrongfulness was concerned, it would be difficult, having regard to the definition contained in article 19, paragraph 2, and to the *erga omnes* nature of the crime, to preclude wrongfulness on account of the consent of the injured State; and that was what article 29, paragraph 2, seemed to indicate. Similarly, a state of necessity was not grounds for precluding wrongfulness in the case of the violation of a *jus cogens* obligation. Apart from those two cases, however, it did not seem that the circumstances precluding wrongfulness could be removed a priori.

58. His position with regard to the general obligation not to recognize the consequences of a crime and not to render assistance to a "criminal" State was consistent with the reasoning which lay behind his proposition that the Security Council should have exclusive responsibility for the decisions incumbent on the international community and, more particularly, on injured States *uti singuli*. The obligation to render assistance to the victim was a matter solely for the sovereign will of each State.

The meeting rose at 1.10 p.m.

2344th MEETING

Friday, 27 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to embark on the second reading of the draft Code of Crimes against the Peace and Security of Mankind. The text of the draft articles, including the commentaries, was to be found in an informal paper which was available in all languages.

2. Mr. THIAM (Special Rapporteur), introducing his twelfth report (A/CN.4/460), said that corrections were required in the text. In the French version, the commas before and after the word *déjà*, in the last sentence of paragraph 4, were to be deleted. In paragraph 21, the words "the second sentence of" should be inserted before "draft article 2". In paragraph 64, the words "rule *non bis in idem*" were to be replaced by "rule set forth in article 6". In subheading 2, directly following paragraph 99, the word *assistance* should be replaced by *existence*, a correction that applied only to the French text. Lastly, in subparagraph (*c*) of paragraph 159 of the French version, the second sentence should form a separate new paragraph 160, the following three paragraphs being renumbered accordingly.

3. The twelfth report was the shortest thus far presented on the topic. The concepts it dealt with had already been discussed at considerable length both in the Commission and in the Sixth Committee, and he had therefore decided to take the course of simply reproducing the text of each draft article as adopted on first reading, without reverting to the discussion on it, except in those cases where no clear view had emerged in the Commission.

4. As indicated in paragraph 1, the report focused on the general part of the draft, namely, chapter I (Definition and Characterization), and chapter II (General Principles). Members who had participated in the elaboration of the draft from the outset would recall the debate on whether the consideration of general principles could logically precede that of the crimes actually to be referred to in the Code. Now that the Commission knew more or less clearly what crimes were involved, it was in a position to embark on the identification of the general principles applicable to those crimes. The chapter dealing with the crimes would form the subject of the next report, which would present a far shorter list of crimes than envisaged earlier. In the light of discussions in the Commission and of observations by Governments, he had decided to limit the number of crimes to those whose inclusion in the Code had not given rise to objections from any quarter. Thus, threat of aggression, intervention, and so on, although characterized as crimes by virtue of resolutions of the General Assembly and the Security Council, could not be so characterized from the point of view of criminal law and he had therefore concluded that it would be wisest to omit them.

5. The layout of the twelfth report was explained in the introduction to the report.

6. Mr. IDRIS, after commending the Special Rapporteur for his excellent report, said that a preliminary issue was article 2, which he continued to think not only confusing but also devoid of any legal value.

7. Mr. THIAM (Special Rapporteur) drew attention to those paragraphs of the report setting out his point of view on article 2, and also to his earlier corrections to

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* Resumed from the 2334th meeting.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1994*, vol. II (Part One).

[3] Ibid.

paragraph 21. It should be noted that he had no objection to deleting the second sentence of the article.

8. Mr. AL-BAHARNA said he noted the view expressed by the Special Rapporteur in the report that the Bulgarian Government's compromise formula for article 1 (Definition) might be adopted subject to drafting improvements. While generally in agreement with the idea of combining a conceptual definition with an enumerative one, he thought the Commission should try to formulate the article as clearly as possible. The draft article, as proposed by the Bulgarian Government, struck him as somewhat circular in character, and he would therefore suggest that it should be reformulated to read:

> "1. For the purposes of this Code, a crime against the peace and security of mankind is any act which constitutes a gross violation of or threat to the international peace and security of mankind.
>
> "2. In particular, the crimes set out in this Code constitute crimes against the peace and security of mankind."

9. He said the correction to paragraph 21 made by the Special Rapporteur was gratifying. Article 2 (Characterization) as a whole was too important to be deleted, for it embodied an important aspect of the draft Code, namely, the autonomy of international criminal law *vis-à-vis* internal law. In order to meet the United Kingdom's criticism, the article could be modified to read:

> "The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that the act or omission in question is not a crime under internal law does not exonerate the accused."

However, if the second part of the article was considered merely a corollary of the first, he would have no objection to it being deleted.

10. With regard to paragraph 3 of article 3 (Responsibility and punishment), he agreed with the Special Rapporteur that it would be an impossible and pointless exercise to specify the crimes to which the concept of attempt might apply. While supporting the idea underlying the paragraph, he suggested that it be amended to read:

> "3. An individual who attempts to commit one of the crimes set out in this Code is responsible therefor and is liable to punishment."

"Attempt" in this paragraph means any act or omission towards the commission of a crime set out in this Code which, if not interrupted or frustrated, would have resulted in the commission of the crime.

11. Article 4 (Motives) had been a bone of contention between several States. The Government of the United Kingdom had, in his opinion, rightly pointed out that that provision would be more appropriately located as part of article 14 (Defences and extenuating circumstances), where it might simply be stated that motive did not constitute a defence. He agreed with the Special Rapporteur's proposal to delete article 4, but would like to see its legal significance reflected in article 14. Article 5 (Responsibility of States) had elicited no unfavourable comments and he therefore saw no reason to change the text.

12. Article 6 (Obligation to try or extradite) was an important provision and he shared the Uruguayan Government's view that it should be linked with international criminal jurisdiction. Article 63 of the draft statute for an international criminal court[4] set out the procedures governing the surrender of an accused person to the court established under the statute. *Ex hypothesi*, article 63 was limited to the court, whereas article 6 of the draft Code would be of general applicability. The two provisions must be harmonized, which could be done by making paragraphs 1 and 2 of article 6 of the draft Code subject to article 63 of the draft statute and by deleting paragraph 3. With regard to the priority to be assigned to the principle of territoriality and the complicity of the territorial State in the commission of the crime, he had reservations about including them in the text adopted on first reading, but was open to persuasion.

13. He did not share the Special Rapporteur's view that article 7 (Non-applicability of statutory limitations) should be deleted. That would be going against the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. As the Convention was confined to "war crimes" and "crimes against humanity", article 7 might also be so restricted, but it should not be left out completely. In the absence of a provision of that kind, States would apply different norms with regard to statutory limitations, something which might ultimately weaken the international system. Article 8 (Judicial guarantees) had, as the Special Rapporteur had noted, "garnered a broad consensus". Although it was acceptable, the Commission should none the less harmonize it with article 44 (Rights of the accused) of the draft statute,[5] as both dealt with the same subject-matter. There was a slight divergence between the texts as to "public hearing": whereas the draft Code envisaged a public trial, the draft statute allowed for a trial *in absentia*. That inconsistency must be avoided.

14. States had sharply criticized article 9 (*Non bis in idem*). The United Kingdom, for example, had found the article to be *prima facie* in conflict with the provisions of the International Covenant on Civil and Political Rights. The Special Rapporteur had felt compelled to re-examine it under two different assumptions: first, where an international criminal court existed and, secondly, where there was no such court. As the Commission was currently drafting a statute for such a court, it was appropriate to take the first assumption and to proceed accordingly. In that context, the new text of article 9 proposed by the Special Rapporteur became highly relevant. He supported it and, indeed, found it to be similar to the text of article 45 (Double jeopardy (*non bis in idem*)) in the draft statute for an international criminal court.[6]

15. One Government had objected to paragraph 2 of article 10 (Non-retroactivity) but he agreed with the Special Rapporteur that the paragraph could justifiably

[4] *Yearbook . . . 1993*, vol. II (Part Two), p. 129.

[5] Ibid., pp. 119-120.

[6] Ibid., pp. 120-121.

be kept, because it reflected article 11 of the Universal Declaration of Human Rights.[7]

16. Article 11 (Order of a Government or a superior) had been criticized, *inter alia*, on the ground that the meaning of the expression "in the circumstances at the time" was not clear. In explanation, the Special Rapporteur stated that the article was based on principle IV of the Principles of International Law recognized in the Charter of the Tribunal and in the Judgment of the Tribunal.[8] However, in view of the criticism caused by replacing the clause "provided a moral choice was in fact possible to him" by "if, in the circumstances at the time", the Commission should revert to the clause contained in principle IV. Article 11 would then read:

> "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of moral responsibility under international law, provided a moral choice was in fact possible to him."

17. Article 12 (Responsibility of the superior) was sound, notwithstanding the reservations of one State that it conflicted with article 3. The article should therefore be retained in its present form. Similarly, he endorsed the text of article 13 (Official position and responsibility), which was squarely based on principle III of the Nürnberg Principles.

18. Article 14 (Defences and extenuating circumstances) had aroused considerable criticism from Governments. It had been challenged on the ground that it had cobbled together two different concepts and that it was too vague. Finding the criticism well taken, the Special Rapporteur had proposed a new text for article 14, on defences, and a new article 15, on extenuating circumstances. The new formulation proposed for article 14, "there is no crime when the acts committed were motivated by self-defence, coercion or state of necessity" was unsatisfactory both in form and in content. Granted that they were possible defences, but they should be dealt with individually in greater detail. The elements mentioned by the Special Rapporteur in his comments could usefully be embodied in the text of the article itself. In their absence, the criticism of vagueness levelled against the original article 14 remained. The Commission should be more specific about self-defence, coercion and necessity. Otherwise, the defences would not be of much practical value to the accused. The Commission should also consider whether it was tenable to include the defences of "insanity", "error" and "consent".

19. The text of new article 15, "When passing applicable sentences, extenuating circumstances may be taken into account by the court hearing the case", should be harmonized with article 54 of the draft statute for an international criminal court (Aggravating or mitigating factors).[9] Unlike the Special Rapporteur, he held that the new article 15 should deal both with extenuating and aggravating circumstances. Moreover, he agreed with the Government of Belarus that the question of extenuating circumstances could be considered in conjunction with that of penalties.

20. Mr. TOMUSCHAT congratulated the Special Rapporteur on an excellent and succinct report and said that the title of the draft brought to mind Chapter VII of the Charter of the United Nations. The draft Code had originally drawn on the Nürnberg Tribunal as a model, but its scope had been enlarged since then, as seen, for example, by article 21 (Systematic or mass violations of human rights). He therefore wondered whether it might not be better to produce another title to reflect the fact that the scope of the draft was now much broader than in the beginning. Perhaps the Drafting Committee could examine the question.

21. He agreed with the Special Rapporteur that the words "under international law" contained in square brackets in article 1, should be deleted, because it was not certain that all crimes enumerated in the draft Code were really crimes under positive international law. It was important to be cautious in that regard. He had doubts, however, about whether it would be possible to find a common denominator for all of the crimes. The risk was that penal prosecution might be based directly on that general wording, which would be at variance with the principle of *nullum crimen sine lege*. He therefore thought the Commission should not strive for a general wording to cover all of the crimes in the draft Code.

22. With regard to article 2, the second sentence could indeed be deleted. Norway and the United Kingdom were nevertheless right in some sense perhaps, for the crimes that the Commission had chosen were punishable in the internal law of all civilized States and, as such, were not completely independent of internal law. The point was that characterization was independent of the characterization in the internal law of any given State. He suggested bringing the language of the first sentence of article 2 into line with the link that existed between the draft Code and the criminal codes of all civilized States.

23. He endorsed paragraph 1 of article 3, but disagreed with the Special Rapporteur about paragraph 2. In part two of the draft Code, great care was taken in determining which persons were responsible for a crime. For example, the purpose of the wording adopted in paragraph 1 of article 15 (Aggression) was to restrict the category of persons punishable for the crime of aggression. If the wording were very vague, it would enormously expand the category of persons who could be punished under the draft Code. For the crime of aggression, every soldier would be punishable, and that would not square with the principles of the law of war. He could also refer to the example of article III (*a*) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which governed participation. This far-reaching provision could not be supplemented by a further provision on participation. Accordingly, paragraph 2 of article 3 should be recast to take into account each of the crimes enumerated in part two of the draft Code.

[7] General Assembly resolution 217 A (III).

[8] Hereinafter referred to as the "Nürnberg Principles". *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45.

[9] *Yearbook... 1993*, vol. II (Part Two), p. 125.

24. Article 4 could be deleted, because it was unnecessary, and he was in favour of retaining article 5, for it said something that needed to be said.

25. The terms of article 6 were rather spare in substance and were inconsistent with the wording found elsewhere in model texts. For example, article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents stipulated that, if the State party did not extradite the alleged offender, it must submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Article 6 of the draft Code, on the other hand, merely spoke of trying or extraditing the person concerned. The formulation of article 6 must be brought into line with the wording in other texts. Mr. Al-Baharna had already drawn attention to the need to harmonize article 6 with article 63 of the draft statute for an international criminal court. In his view, an additional paragraph should be drafted, giving priority to requests for extradition from an international criminal court. It would also be noted that the French version of article 6, paragraph 1, as it appeared in the report of the Special Rapporteur, had neglected to state that the individual concerned was alleged to have committed a crime.

26. He had no definite position on article 7, although he considered that it should be re-examined. He wondered, however, whether the non-applicability of statutory limitations should apply for all time. Was there any point in bringing to justice the perpetrator of a crime against the peace and security of mankind 30 or 40 years after the crime had been committed? All kinds of difficulties could arise after such an interval. A compromise solution might be to add a clause to provide that time would cease to run for so long as there were factual grounds for not initiating criminal proceedings. In countries where criminals were in power, for instance, it was simply not realistic to bring proceedings while they were in power, a period, therefore, during which time should cease to run.

27. He agreed with article 8, which reproduced article 14, paragraph 3, of the International Covenant on Civil and Political Rights more or less word for word. He also agreed with the new text of article 9 proposed by the Special Rapporteur, one which was modelled on the provisions of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia,[10] and with the deletion of paragraph 4 of the original version. He did not, however, concur with the observations of the Government of the United Kingdom. On the basis of a close study, it had been concluded that, under existing positive law, the *non bis in idem* principle applied only within a given legal system. In other words, there were certain limits to the prohibition imposed by that principle so that proceedings taken in another State, on the same facts, were not precluded. That understanding of the position had, in fact, been endorsed by some international bodies.

[10] Document S/25704, annex.

28. He could not agree with the Special Rapporteur that article 10 was based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights, which referred to "general principles of law recognized by the community of nations". Article 10, paragraph 2, however, referred to "international law or domestic law applicable in conformity with international law". If he remembered rightly, a conscious decision had been taken to give expression to the conviction that the world had entered the era of written law and hence there was no need to rely on unwritten principles. The phrase used in article 10, paragraph 2, had also been used to underline the importance of the principle of the rule of law. It should, therefore, be retained.

29. The Commission might wish to consider whether the word "possible", in article 11, should be qualified, perhaps by the word "really" or the word "morally". In German, the word *zumutbar* conveyed the idea but, unfortunately, it was untranslatable. Essentially, its connotation was that there existed a threshold concerning the sacrifices that could be reasonably expected of a person.

30. Article 12 should be re-examined, in his view, as it imposed a very heavy responsibility on the superior. The Commission should also consider the sources of the article. Article 13, on the other hand, commanded his full support. The Special Rapporteur had proposed a new text for article 14. Again, it seemed that the article should be split into two, as two different concepts were involved. An act done in self-defence was not illegal, whereas, in the case of coercion and state of necessity, fault was removed but not wrongfulness. He agreed entirely that the defence of error should have a place in the draft; it was unlikely, however, to be frequently invoked in the Code of Crimes against the Peace and Security of Mankind.

31. The high calibre of the Special Rapporteur's report should enable the Commission to conclude its work on the topic at the present session.

32. Mr. PELLET, speaking on a point of procedure, said that, notwithstanding the very interesting statements made by Mr. Al-Baharna and Mr. Tomuschat, he would propose that the Commission should examine the draft, article by article, after members had made any general observations. That would make for a livelier and more coherent debate.

33. Mr. THIAM (Special Rapporteur) said that he would have no objection to such a procedure.

34. Mr. BENNOUNA, supporting Mr. Pellet's proposal, said he would point out that the Commission was dealing with two interlinked topics: the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. Some of the provisions of the statute dealt with subjects covered by the draft Code. In the circumstances, he was concerned to ensure that the Commission would not envisage referring the draft Code to the General Assembly when the first reading of the draft statute had perhaps not even been completed. Some coordination of the work of the Commission was therefore necessary.

35. Following a further exchange of views in which Mr. CALERO RODRIGUES, Mr. GÜNEY, Mr. ROSENSTOCK, Mr. Sreenivasa RAO, Mr. VILLAGRÁN KRAMER and Mr. YANKOV took part, the CHAIRMAN said he would suggest, in the light of comments made, that members should first have the opportunity to make their general statements, after which the draft Code would be considered article by article, having regard to the fact that the subject-matter of some of the articles was under consideration in the Working Group on a draft statute for an international criminal court. He would then convene a meeting of the Bureau to decide how to coordinate further work on the two subjects.

It was so agreed.

The meeting rose at 11.30 a.m.

2345th MEETING

Tuesday, 31 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN said that, as agreed, the consideration of the topic would be broken down into two parts, beginning with a general discussion that would take only one meeting and followed by an examination of the individual articles, certain of which dealt with questions also treated in the Working Group on a draft statute for an international criminal court. In order to avoid excessively fragmenting the second part of the debate, which would last for several meetings, he proposed taking up five clusters of articles successively, namely, articles 1 to 4 first, followed by articles 5 to 7, articles 8 to 10, articles 11 to 13, and, lastly, articles 14 and 15.

2. If he heard no objection, he would take it that the Commission agreed to proceed in that manner.

It was so agreed.

3. Mr. PELLET said that he wanted to make three brief comments in the framework of the general discussion.

4. The first concerned the title itself of the Code of Crimes against the Peace and Security of Mankind, which was entirely deceptive. The title was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity, that did not come under the peace and security of mankind unless the concept was given a very broad meaning, which would play into the hands of ideologies with an emphasis on security. A review was therefore necessary because it was the Commission's last chance to remedy that great weakness in the text.

5. His second comment concerned the problem raised by the relationship between the Code and the statute for the international criminal court, which affected less the drafting of the Code, that was perfectly viable with or without the court, than it did the establishment of the statute for the court, for which it was still uncertain whether it would have jurisdiction for applying the Code. He cautioned the members of the Commission against the temptation of rigidly linking the two exercises and even more so against making the adoption of one of the instruments contingent on the adoption of the other. Such an approach might well prove to be totally sterile.

6. Inevitably, however, there were provisions and problems common to the two drafts, as Mr. Bennouna had already pointed out (2344th meeting). In particular, he acknowledged that, apart perhaps from articles 1 and 5, all the articles of part one of the Code were related to the statute of the court. That did not prevent the Commission from considering the draft Code on second reading because nothing justified the Commission's giving priority to the statute of the court over the Code, but such consideration should take place in the light of the draft statute. Above all, it was very important, with regard to each of the articles of the draft Code, for the Chairman or the members of the Working Group on a draft statute for an international criminal court to provide information on the corresponding progress made so that the discussions could be mutually enriching and incompatibility avoided. By the same token, it was essential for the Working Group to take the draft Code fully into account for the drafting of the statute and, assuming that the draft Code was adopted on second reading prior to the completion of the draft statute, the Working Group must use the wording of the Code. It therefore had to demonstrate consistency and intellectual discipline and not go back on its decisions, whether in the framework of the Code or in that of the statute.

7. His third comment related to part two of the draft Code, on crimes, and concerned the intention expressed

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

[3] Ibid.